Supreme Court, U.S.
FILED
OCT 7 1998
OFFICE OF THE CLERK

No. 98-411

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

RICHARD HUBER,

Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION FOR DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBLITY AND OFFICE OF BAR COUNSEL

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18 pp

QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals, in approving Petitioner's consent to disbarment, correctly ordered him to make restitution, with interest, to certain clients as a condition of reinstatement and properly denied *nunc pro tunc* treatment of his consent on the ground that Petitioner had submitted materially false affidavits attesting to his cessation from the practice of law?

2. Whether the District of Columbia Court properly suspended Petitioner on an emergency basis in 1995, upon finding that his continued practice of law presented an imminent hazard to clients and the public?

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals, accepting Petitioner's consent to disbarment, ordering him to make restitution, together with interest, to certain clients as a condition of reinstatement, and denying *nunc pro tunc* treatment to his previous affidavits, in which he had attested falsely to his cessation from the practice of law (Pet. App. 1), appears at 708

A.2d 259 (D.C. 1998). The District of Columbia Court's order of emergency suspension, entered March 8, 1995, is unreported (App. at 1a).

JURISDICTION

The judgment of the court of appeals for which review is sought was entered March 19, 1998. Petitioner's timely petition for rehearing or for rehearing *en banc* was denied on May 20, 1998. Petitioner lodged his petition for writ of certiorari with this Court on or about August 18, 1998 (the precise date is unknown to respondents), and the clerk of this Court accepted the petition for filing on September 9, 1998.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the District of Columbia Court of Appeals to discipline members of its Bar and the relevant rule of procedure promulgated by that court are set out in an Appendix to this brief (App. at 4a).

STATEMENT OF PROCEEDINGS BELOW

Petitioner is a disbarred attorney and former member of the District of Columbia Bar.[1] He was the subject of formal disciplinary charges proffered by the Office of Bar Counsel, alleging that he had engaged in multiple instances of misappropriation of client funds, commingling of personal and entrusted funds, neglect, dishonesty, and other acts of professional misconduct. Two hearing

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[1] Throughout the proceedings below, Petitioner was referred to as "Respondent." In conformity with Supreme Court practice, we refer to him as the Petitioner throughout this brief in opposition.

committees of the Board on Professional Responsibility (the "Board") conducted evidentiary hearings at which Petitioner was represented by counsel. In neither proceeding did Petitioner raise, in mitigation of possible sanction, any issue concerning his mental or medical condition or its effect upon his professional conduct.

Each of the committees rendered a report finding that Petitioner had engaged in serious misconduct and recommending his disbarment in one proceeding and suspensory discipline in the other. While Petitioner's exceptions to the hearing committees' reports and recommendations were pending before the Board, the District of Columbia Court of Appeals (the "District of Columbia Court" or "Court of Appeals") modified its rules governing the Bar to provide, among other things, that the Court of Appeals might suspend an attorney upon an interim, emergency basis upon a showing that he "appears to pose a substantial threat of serious harm to the public . . . ." D.C. App. R. XI, §3(c)(1) (App. at 5a).[2] Bar Counsel petitioned the Board to seek an order of emergency suspension under the amended Rule, and the Board did so. On March 8, 1995, the District of Columbia Court granted the Board's petition and suspended Petitioner from the practice of law.

Thereafter, the Board rendered an extensive report (not included in Petitioner's appendix before this Court), upholding the findings of the hearing committees that Petitioner had engaged in professional misconduct and adding findings of its own. The Board recommended that

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[2]The predecessor version of the rule had required a showing that the attorney "appears to be causing great public harm by misappropriating funds, or by other actions," and thereby required Bar Counsel to show current conduct on the part of the attorney.

Petitioner be disbarred. In its report recommending disbarment, the Board recommended that Petitioner be required to make restitution to four clients, with interest from the date of the wrongful taking. The Board also denied Petitioner's motion, filed on his behalf by successor counsel after the second hearing committee had rendered its report and recommendation, that his cases be remanded to a hearing committee to receive evidence concerning an alleged mental or medical condition that Petitioner contended had substantially affected his professional conduct and that, he contended, warranted a mitigation of sanction.

Petitioner excepted to the Board's report and moved the District of Columbia Court for an evidentiary hearing on his plea in mitigation. The Court of Appeals referred the motion to the Board, which again denied it in a further report (also not included in Petitioner's present appendix). Petitioner's successor counsel thereafter sought and obtained 16 extensions of time in which to file his brief before the District of Columbia Court, aggregating about a year.

While Petitioner's appeal was pending before the District of Columbia Court, Bar Counsel developed evidence that Petitioner had continued to engage in the practice of law while subject to the Court of Appeals' order of interim suspension. Bar Counsel sought and obtained an order of the Court of Appeals that Petitioner show cause why he should not be held in contempt. At a criminal trial before a Superior Court judge, sitting by designation as a member of the Court of Appeals, Petitioner pleaded guilty to two counts and was sentenced to a jail term of 150 days, with all but 30 days suspended and with leave granted to serve the term of incarceration in a halfway house.

On the eve of oral argument before the District of Columbia Court on Petitioner's exception to the Board's report and recommendation, Petitioner moved the Board to accept his consent to disbarment pursuant to D.C. App. R. XI, §12 (App. at 6a). In his affidavit, Petitioner stated that he "accepted the order of the Board relating to restitution." The Board accepted the consent, conditioned upon Petitioner's payment of restitution to certain clients, together with interest, and the denial of *nunc pro tunc* treatment to his affidavits, previously filed with the Court of Appeals, in which he had attested falsely that he had ceased the practice of law. Petitioner excepted to the conditions recommended by the Board and embarked on a fresh round of briefs before the Court of Appeals. In his reply brief, he sought to withdraw his consent to disbarment. The Court rejected Petitioner's contentions in all respects and subsequently denied his petition for rehearing or rehearing *en banc*. The present petition for writ of certiorari followed.

REASONS FOR DENYING THE PETITION

1. The District of Columbia Court accorded Petitioner abundant due process. He received full-dress evidentiary hearings before two different hearing committees of the Board, each of which found that he had engaged in serious professional misconduct. Before those committees, and while represented by counsel, he did not raise any plea in mitigation of sanction based upon a claim of disability and accordingly waived the contention. The Board in turn entertained extensive pleadings on Bar Counsel's motion to petition the Court of Appeals for an emergency order of suspension, and Petitioner was at liberty to contest that application both before the Board and again before the District of Columbia Court. He

tendered his consent to disbarment on the eve of oral argument before the Court of Appeals. He had no constitutional right to withdraw his consent simply because he disagreed with the terms recommended by the Board as conditions to acceptance of the consent. He had a full hearing before the District of Columbia Court, with briefs and oral argument, concerning his objections, which the Court rejected on the merits in a careful opinion.

The District of Columbia Court acted well within its prerogative to require Petitioner, as a condition of his ultimate reinstatement to practice, to make complete restitution, together with interest, to certain clients whose funds he had mishandled. Restitution is a well-established ancillary remedy in disciplinary proceedings, and its availability is governed by a provision in the Court of Appeals' rules governing the Bar. D.C. App. R. XI, §3(b) (App. at 5a). As the Court of Appeals noted, Petitioner had acquiesced in the imposition of an interest component when he had consented to disbarment.

Likewise, the District of Columbia Court acted properly in determining the timing of Petitioner's disbarment. The Court of Appeals was not obliged to accept Petitioner's demand for retroactive treatment, in effect shortening the period of disbarment, where the affidavits submitted by Petitioner to attest to his cessation from the practice of law, as required by the Court of Appeals' rules and its order of emergency suspension, were materially false.

2. The District of Columbia Court properly grounded its order of emergency suspension upon a full evidentiary record, compiled before the hearing committees, at which Petitioner had been present, represented by counsel, and enabled to confront and cross-examine the witnesses

against him and to adduce evidence on his own behalf. He was afforded ample opportunity to submit briefs in opposition to Bar Counsel's motion to the Board for the emergency order and to the Board's petition to the Court of Appeals for such an order. He had no constitutional right to insist that the disciplinary system repeat the process or conduct another round of evidentiary hearings on the Board's petition for the emergency order.

In any event, if Petitioner wished to seek this Court's relief from the District of Columbia Court's order on the theory that it operated in effect as a final order, collateral to and separate from the Court of Appeals' ultimate order of final discipline, he should have petitioned this Court for a writ of certiorari within 90 days of the entry of the interim order, rather than have waited more than three years to contest its validity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 1998

APPENDIX A

ORDER OF TEMPORARY SUSPENSION

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 95-BG-35
Bar Docket No. 44-92, *et al.*
In the Matter of

RICHARD A. HUBER, ESQUIRE, Respondent

A Member of the Bar of the
District of Columbia
Court of Appeals

Before: Steadman and King, Associate Judges; and Belson, Senior Judge.

ORDER

On consideration of the petition of the Board on Professional Responsibility (the "Board") pursuant to D.C. Bar R. XI, §3(c) for a temporary suspension of Richard Huber, Esquire, a member of the Bar of the District of Columbia, and of the opposition thereto, of the subsequently submitted Order, Report and Recommendation of the Board that respondent be disbarred, of the motion by Bar Counsel pursuant to D.C. Bar R. XI, §14(e), and of respondent's opposition thereto, it is

ORDERED that the petition and motion are granted and that respondent Richard Huber is hereby suspended

from the practice of law in the District of Columbia, effective immediately, pending the Court's determination of this matter. It is

FURTHER ORDERED that respondent is required to disclose to the Board and Bar Counsel within ten (10) days of the date of this order the identity of all accounts where he maintains funds subject to Rule 1.17 (A) of the District of Columbia Rules of Professional Conduct, and it is

FURTHER ORDERED that respondent's maintenance and use of accounts maintained pursuant to Rule 1.17(A) is hereby restricted to the extent that, effective immediately upon service of this order upon respondent and until further order of the Court, respondent (i) shall comply fully with the requirements of Rule 1.17(A) and (ii) shall disburse funds subject to the Rule only with the prior approval and co-signature of a member or members of the Bar who the Board may designate to serve as financial monitor(s), and it is

FURTHER ORDERED that Bar Counsel shall serve copies of this order upon respondent and upon each financial institution in which respondent is known or believed to maintain funds subject to Rule 1.17(A), such order to serve as an injunction barring each financial institution so served from making payments from the account on any obligation except with the prior approval and co-signature of the financial monitor or monitors referred to in the preceding paragraph of this order; and it is

FURTHER ORDERED that respondent shall comply fully with the provisions of Rule XI, § 3(c) concerning (i) the acceptance of new cases and other legal matters and (ii) the deposit, in a trust account complying with the

provisions of Rule 1.17, of any and all fees tendered at any time after service of this order upon respondent; and it is

FURTHER ORDERED that respondent's attention is drawn to the requirements of Rule XI, §14 relating to suspended attorneys and to the provisions of Rule XI, §16(c) dealing with the timing of eligibility for reinstatement as related to compliance with §14, including the filing of the required affidavit.

PER CURIAM

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APPENDIX B

JURISDICTIONAL STATUTE AND RULE

District of Columbia Code, Section 11-2502:

> The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission.

District of Columbia Court of Appeals Rule XI Governing the Bar, § 1(a):

> Persons subject to disciplinary jurisdiction. All members of the District of Columbia Bar, all persons appearing or participating *pro hac vice* in any proceeding in accordance with Rule 49(c)(1) of the General Rules of this Court, all persons licensed by this Court as Special Legal Consultants under Rule 46(c)(4), and all persons who have been suspended or disbarred by this Court are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility (herein after referred to as "the Board").

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS RULE XI GOVERNING THE BAR

§3(b):

Conditions imposed with discipline. When imposing discipline, the Court or the Board may require an attorney to make restitution either to persons financially injured by the attorney's conduct or to the Clients' Security Trust Fund (see Rule XII), or both, as a condition of probation or of reinstatement. The Court or the Board may also impose any other reasonable condition, including a requirement that the attorney take and pass a professional responsibility examination as a condition of probation or of reinstatement.

§3(c):

Temporary suspension or probation. (1) On petition of the Board authorized by its Chairperson or Vice Chairperson, supported by an affidavit showing that an attorney appears to pose a substantial threat of serious harm to the public, the Court may issue an order, with such notice as the court may prescribe, temporarily suspending the attorney or imposing temporary suspension or probation on the attorney or both. Any order of temporary suspension or probation, which restricts the attorney's maintenance or use of a trust account shall, when served on any bank maintaining an account against which the attorney may make withdrawals, serve as an injunction barring the bank from making payment from the account on any obligation except in accordance with restrictions imposed by the Court.

An order of temporary suspension issued under this subsection shall preclude the attorney from accepting any new cases or other legal matters, but shall not preclude the attorney from continuing to represent existing clients during the thirty-day period after issuance of the order; however, any fees tendered to the attorney during the 30-day period or at any time thereafter while the temporary suspension is in effect shall be deposited in a trust account, from which withdrawals may be made only as directed by the Court.

§12(a):

Disbarment by consent. (a) Required affidavit. An attorney who is the subject of an investigation or pending proceeding based on allegations of misconduct may consent to disbarment, but only by delivering to Bar Counsel an affidavit declaring the attorney's consent to disbarment and stating:

(1) That the consent is freely and voluntarily rendered, that the attorney is not being subjected to coercion or duress, and the attorney is fully aware of the implication of consenting to disbarment;

(2) That the attorney is aware that there is currently pending an investigation into, or proceeding involving, allegations of misconduct, the nature of which shall be specifically set forth in the affidavit;

(3) That the attorney acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and

(4) That the attorney submits the consent because the attorney knows that if disciplinary proceedings based on the alleged misconduct were brought, the attorney could not successfully defend against them.

§12(b):

Action by the Board and the Court. Upon receipt of the required affidavit, Bar Counsel shall file it and any related papers with the Board for its review and approval. Upon such approval, the Board shall promptly file it with the Court. The Court thereafter may enter an order disbarring the attorney on consent.